



March 5, 2002

Ms. Kimberley Mickelson
Olson & Olson
Three Allen Center, Suite 3485
333 Clay Street, Suite 3485
Houston, Texas 77002

OR2002-1074

Dear Ms. Mickelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 159342.

The City of Friendswood (the "city"), which you represent, received three written requests for:

- 1) All police department communications (radio and/or telephone) on November 30, 2001 from exactly 9:10 AM to 3:00 PM.
- 2) Any and all documents which relate to the shooting incident at the Friendswood Jr. High School on November 30, 2001. This would include but not be limited to all CAD reports.
- 3) Any and all documents which relate any incidents occurring at the Friendswood Jr. High School. This would include but not be limited to assaults, students with any contraband items such as guns, knives, drugs etc. This request is for 50 pages of the most recent incidents. Any information, which is contained in a computer memory, is requested to be produce (sic) on a computer disk and not to be included in the 50 page count.

You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your concerns as to the third request. The requestor asks for any information contained in a computer memory pertaining to Friendswood Junior High School incidents. You state that the city "cannot produce a computer disk with information limited by subject automatically." We note that the Act applies only to "public information" in existence at the time of the request for information. See Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory." *Id.* § 552.002(c).

Computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. To the extent information responsive to the instant request has only been placed in the "trash bin" or "recycle bin" of a program, the information is still being "maintained" by the city for purposes of the Act and is still considered "public information." However, to the extent information responsive to the instant request has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT, we believe the information is no longer being "maintained" by the city and therefore the information is no longer public information. *Id.* § 552.002(a).

The Act does not require the governmental body to prepare new information in response to a request. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex.App.—Eastland 2000, pet. denied); Attorney

General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). However, a request for public information that requires a governmental body to program or manipulate existing data is not considered a request for the creation of new information. *See id.* Thus, the city's officer for public information carries the duty of promptly producing such public information when it is requested, unless the city wishes to withhold the information. *Id.* §§ 552.203, .221. If the city wishes to withhold the information, it must request a decision from the attorney general and submit to the attorney general, among other things, a copy or representative sample of the public information being requested. *Id.* § 552.301. Therefore, to the extent information responsive to the instant request was still contained in a trash bin of a city computer program at the time of the request, or was located elsewhere in the hard drive of the city's computers, the city was obliged to retrieve that information and promptly make it available to the requestor or submit it to the Attorney General for a decision within fifteen business days of receiving the request. The city did not submit a representative sample of such information for our review. Thus, to the extent such responsive information exists, we presume the city has made the information available to the requestor. *See* Gov't Code § 552.021, .301, .302.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

In this instance, you have not established that the submitted information involves juvenile conduct that occurred after September 1, 1997. You have not established that the information names a juvenile suspect. You have marked the name of an individual in one

of the CAD reports as a "juvenile." However, you have not established that the report concerns conduct by a juvenile. Therefore, the submitted information is not subject to section 58.007 of the Family Code. Thus, the information may not be withheld under section 552.101.

You claim that the submitted information is excepted from disclosure pursuant to section 58.005 of the Family Code. Section 58.005 provides:

(a) Information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court may be disclosed only to:

- (1) the professional staff or consultants of the agency or institution;
- (2) the judge, probation officers, and professional staff or consultants of the juvenile court;
- (3) an attorney for the child;
- (4) a governmental agency if the disclosure is required or authorized by law;
- (5) a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- (6) the Texas Department of Criminal Justice and the Texas Juvenile Probation Commission for the purpose of maintaining statistical records of recidivism and for diagnosis and classification; or
- (7) with leave of the juvenile court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

You do not explain, nor can we ascertain from our review of the submitted information, how this information constitutes information obtained for the purpose of diagnosis, examination, evaluation, or treatment or for making a referral for treatment of a child by a public or private agency or institution providing supervision of a child by arrangement of the juvenile court or having custody of the child under order of the juvenile court. Accordingly, we cannot

conclude that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 58.005 of the Family Code.

You state that the submitted information "may be further protected under provisions of the Education Code, since the activity took place on school grounds." However, you fail to cite a specific applicable exception. Where a governmental body fails to indicate an applicable exception, the information in question is presumed to be open. Open Records Decision Nos. 565 (1990), 325 (1982), and 321 (1990). Furthermore, the Act requires a governmental body to explain the applicability of a raised exception. Gov't Code §552.301(e)(1)(A). Because you do not raise a specific exception and explain its applicability, you may not withhold the information under provisions of the Education Code.

You claim that the information is excepted under section 552.108. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information relates to a pending criminal investigation. Based on this representation, we conclude that the release of the incident report and the submitted audio tape would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). However, you have not established that the submitted CAD reports relate to the incident of November 30, 2001. Furthermore, you do not explain how the release of these reports would interfere with the "detection, investigation, or prosecution of crime." Thus, the incident report and audio tape may be withheld pursuant to section 552.108. However, the CAD reports must be released to the requestor.

We note that information normally found on the front page of an offense report is generally considered public. See generally Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007.

Finally, we note that one of the CAD reports contains information subject to section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

...

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas license plate number, which we have marked, under section 552.130.

In summary, with the exception of the basic information, the city may withhold the incident report and audio tapes pursuant to section 552.108. The city must withhold the license plate number in the CAD report, which we have marked. The remaining information must be released to the requestor. We presume the city has released responsive information held in city computer memory.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

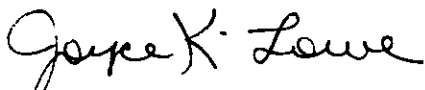
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 159342

Enc: Submitted documents

c: Mr. Jeff Branscome
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(w/o enclosures)